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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1277

CHESTER C. FOSGATE COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Horrell F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Chester C. Fosgate Company, presenting this petition for writ of certiorari to review a decision of the Fifth Circuit Court of Appeals, shows unto this Honorable Court:

(a) Summary Statement of the Matter Involved.

This is a suit by Chester C. Fosgate Company to recover from the United States certain taxes collected ostensibly under the provisions of Title IX of the Social Security Act with respect to employment during the year 1937, which

the petitioner contends were paid with respect to wages of certain of its employees whose "service" constituted "agricultural labor" within the meaning of Section 907 of said Act (42 U. S. C. A. 1107), agricultural labor having been exempted thereby from the type of services upon which the payroll tax was levied.

The suit was instituted for the recovery severally of taxes paid with respect to labor engaged in, (a) cultivating citrus fruit, (b) harvesting citrus fruit, (c) hauling citrus fruit, and (d) preparing citrus fruit for market.

The United States District Court for the Southern District of Florida allowed recovery of the tax paid with respect to the cultivation labor, but denied recovery as to the balance. Upon an appeal by the taxpayer and a cross-appeal by the United States, the District Court's decision was affirmed, and it is to the part of this decision denying recovery that the present petition is addressed.

The harvesting labor which the lower court held was properly construed by the taxing authorities as being beyond the scope of the term "agricultural labor", was engaged in harvesting citrus fruit on groves owned or leased by the taxpayer and upon groves from which the fruit was purchased by the taxpayer interchangeably and in such a way that no records were available to segregate the services performed as between the various types of groves upon which it might have been performed. These laborers are transported to groves from which it is intended to harvest the fruit and supplied ladders and field boxes in which to place the fruit, each picker supplying his own shears with which the fruit is clipped from the tree and placed by him in a bag of his own hung over his shoulders. This bag has a collapsible bottom through which, when full, the fruit is released into the field boxes.

Other laborers separately classified and styled "loaders", load the field boxes on a grove truck commonly called in the

industry a "goat" truck, which hauls the fruit to the edge of the grove, where it is transferred to a road truck for transportation to a packing house. The loaders also assist in loading empty field boxes throughout the grove.

A third division of employees likewise separately segregated throughout the suit consists of the "goat operators" or those who drive the goat trucks and sometimes assist in loading and unloading the empty field boxes. It is these services which we shall hereafter refer to as "harvesting labor", which the petitioner primarily feels constitutes "agricultural labor" as much so as the cultivation labor with respect to which recovery of the tax was allowed (R. 21, 40-42).

Other services with respect to wages for which the tax was sought to be recovered included those of the truck drivers who haul the fruit from the grove to the packing house and the packing house employees, including general house labor, packers, graders and foremen. We shall refer hereafter to the truck drivers as "hauling labor" and to the others as "packing house labor". The packing house labor we concede is in a doubtful category and either may or may not be agricultural labor within the meaning of the particular Act, and it may be perfectly proper to construe the hauling labor to be incidental to the preparation of the fruit for market rather than incidental to the harvesting of the fruit, but we believe it will be clear that the harvesting labor is "agricultural labor" by any criterion.

The Circuit Court of Appeals rendered its opinion on February 6, 1942 (R. 95), following which the taxpayer submitted a Petition for Rehearing on February 27, 1942, which was denied on March 7, 1942, (R. 107).

(b) Statement of the Jurisdiction.

(1) This petition for certiorari is predicated upon the provisions of Section 240 (a) of the Judicial Code, Act of February 13, 1925, as amended (Chapter 229, 43 Stat. 936).

(2) This action arose under and involves the construction of the Social Security Act of 1935 (August 14, 1935, C. 531, 49 Stat. 639, 642).

Title IX of the Act under which the tax was levied reads in part as follows:

> "Section 901. On and after January 1, 1936 every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percents of the total wages (as defined in Section 907) payable to him, regardless of the time of payment with respect to employment (as defined in Section 907) during such calendar year:
>
> "2. With respect to employment during the calendar year 1937 the rate shall be two per centum." (42 U. S. C. A. 1101).
>
> "Section 907. When used in this title—
>
> "(c) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—
>
> "(I) Agricultural Labor;—"

The tax was collected in the instances complained of by reason of Section 206 (I) of Regulations 90, promulgated by the Commissioner of Internal Revenue under Title IX of said Act as follows:

> "The term 'agricultural labor' includes all service performed—
>
> (a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops or the raising, feeding or management of livestock, bees, or poultry; or
>
> (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or

marketing of those materials or articles. Such services do not constitute 'agricultural labor' however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations."

The last sentence of said Regulations was construed by the Commissioner to be a condition of all the preceding language. In other words, by the regulation, no services, regardless of functional considerations, were deemed agricultural labor by the Commissioner unless performed in the employ of the owner or tenant of the farm on which was produced the commodity with respect to which such services were performed.

The Act was subsequently amended (August 10, 1939, C. 666, 53 Stat. 1387, 1392), and the amendment effective January 1, 1940, admittedly exempts as "agricultural labor" all of the services with respect to which the tax is here sought to be recovered, providing as follows:

"(L) Agricultural Labor. The term 'agricultural labor' includes all services performed—

(1) On a farm in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity—

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provi-

sions of this paragraph shall not be deemed to be applicable—in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. As used in this subsection, the term 'farm' includes—fruit-farms, plants, ranches, nurseries, ranges, greenhouses or similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards" (26 U. S. C. A. 1607).

(3) Since there can be no dispute over jurisdiction, it would seem to be surplusage to cite cases believed to sustain the jurisdiction, the problem being to select which cases to cite.

It is plain that the provisions of Section 240 (a) of the Judicial Code heretofore cited is applicable to the decisions of the Circuit Court of Appeals and allows a writ of certiorari to such decisions.

Magnum Import Co. v. *Coty,* 262 U. S. 159;
National Labor Relations Board v. *Waterman S. S. Corp.,* 309 U. S. 206.

It is likwise plain that certiorari has been granted in suits against the United States for the refund of taxes.

George Moore Ice Cream Company v. *Rose,* 289 U. S. 373;
Stahmann v. *Vidal,* 305 U. S. 61.

Further there are numerous instances wherein certiorari has been granted to consider the proper construction of Federal taxing acts.

Lang v. *Commissioner of Internal Revenue,* 289 U. S. 109;
Farmers Loan & Trust Co. v. *Minnesota,* 280 U. S. 204;
Crooks v. *Harrelson,* 282 U. S. 55.

(c) The Questions Presented.

While there is only a single issue presented, that is, the proper meaning of the term "agricultural labor" as used in Title IX of the Social Security Act, and for that reason there will only be one division of the argument, because there is an important basic distinction as to the harvesting services and those performed after the commodity leaves the farm, two separate questions will be here stated:

1. Do services performed during 1937 on the farm in harvesting citrus fruit, regardless of for whom performed, constitute agricultural labor within the meaning of Section 907 (c) of the Social Security Act?

2. Do services performed during 1937 in hauling citrus fruit from the farm to the packing house in the vicinity of the farm and in handling, packing, processing, grading, packaging and delivering it to market or to a carrier for transportation to market, regardless of for whom performed, severally constitute "agricultural labor" within the meaning of Section 907 (c) of the Social Security Act?

(d) Reasons Relied On for the Allowance of the Writ.

1. The Fifth Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court. The problem of what constitutes "agricultural labor" has consistently been a very troublesome one not only under the Act with which we are here concerned, but under various other social measures in pari materia with the present Act, though following the confusion resulting from administrative action, Congress has resolved the difficulty under the Social Security Act by amending the Act to precisely define the term.

This administrative confusion was already evident at

the time of the adoption of the Fair Labor Standards Act of 1938, and a precise definition is likewise therein adopted (29 U. S. C. A. 203 (f), June 25, 1938, C. 676, Section 3, 52 Stat. 1060).

However, the National Labor Relations Act was adopted at about the same time as the Social Security Act, and there Congress not having anticipated the difficulty which would result from administrative action, did not adopt a special definition of the term (29 U. S. C. A. 151, July 5, 1935, C. 372, Section 1, 49 Stat. 449), and the term as used in that Act seems to have been defined insofar as it applies to the packing house labor through judicial action. *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d), 76 (C. C. A. 9th) Cert. Deni. 310 U. S. 632.

In the latter case there is dictum to the effect that both the cultivation and harvesting labor would have been regarded as being within the purview of the term, though only the packing house labor was directly involved in the action, and it is largely because of this decision that we must carefully preserve the distinction between the cultivation and harvesting labor on the one hand and the packing house labor on the other, the latter having been held to be not included within the term under the National Labor Relations Act, though we can still rely upon considerations of legislative history to distinguish the legislative intent in each instance.

We have been advised and therefore say that there is litigation both in existence and in contemplation in the various District Courts of the country involving a consideration of this identical term, and it is probable that a judicial conflict will eventually result, though this has not yet occurred; that many hundreds of thousands of dollars in claims for tax refunds have been filed and will be determined by a decision in this case.

2. The Fifth Circuit Court of Appeals has decided in this case a Federal question in a way probably in conflict with applicable decisions of this court.

The decision in this case conflicts with the several decisions of this court establishing the principle that effect should be given to the ordinary meaning of words used by Congress, in that the court below did not apply the plain ordinary meaning of the term "agricultural labor" through excluding from the narrowest meaning of that term labor performed in harvesting citrus fruit.

U. S. v. *American Trucking Association,* 310 U. S. 534;
U. S. v. *Wurts,* 303 U. S. 414;
Deputy v. *DuPont,* 308 U. S. 488;
Browder v. *U. S.,* 312 U. S. 335.

The decision of the court below conflicts with the several decisions of this court to the effect that statutes should be construed so as to avoid unjust and oppressive consequences, in that the effect of the decision is to confirm the exemption to a few large operators who are able to integrate their activities and to deny the exemption to those who serve the small farmer.

Farmers Loan & Trust Company v. *Minnesota,* 280 U. S. 204.

The decision below likewise conflicts with that line of decisions which hold that the broad policy of Congress should be effectuated in construing a statute in that the court ignores the policy of Congress to favor agriculture generally in a broad sense.

Nardone v. *U. S.,* 308 U. S. 338;
Inland Waterways Corp. v. *Young,* 309 U. S. 517;
Carmichael v. *Southern Coal & Coke Co.,* 301 U. S 495;
Helvering v. *Bliss,* 293 U. S. 144.

In giving undue weight to a segregated consideration of one statement contained in a Congressional Report, the

courts below likewise conflicted with those decisions of this court which hold that in determining the effect of legislative history, weight should be given to the statements of the floor leaders advocating a measure as well as to Committee Reports.

Helvering v. *Twin Bell Oil Syndicate*, 293 U. S. 312;
Wright v. *Mountain Trust Bank*, 300 U. S. 440.

The decisions below further conflict with the decisions of this court in failing to give proper treatment to the 1939 Amendments of the Social Security Act as clarifying of the previously existing congressional intent.

Luckenbach Steamship Co. v. *U. S.*, 280 U. S. 173;
Helvering v. *New York Trust Co.*, 292 U. S. 455;
Helvering v. *Twin Bell Oil Syndicate*, 293 U. S. 312.

Finally, in neither affirming nor upsetting the administrative regulation and the administrative interpretation thereof, but in lieu thereof attempting to superimpose thereon a construction justified by neither and contrary to any concepts previously suggested by either party, yet attempting to give great weight despite such inconsistencies to the regulation, the decision of the court below further conflicts with the principles established by this court as to the effect to be given to administrative interpretations of the law, particularly that principle which holds ambiguous regulations to be without persuasive force.

Sanford v. *Commissioner of Internal Revenue*, 308 U. S. 39.

Respectfully submitted,

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